

EXHIBIT "A"STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION FOR
BENEFICIAL WATER USE PERMIT NO.
9787-g76L BY DONALD V. AND DOREEN
M. FROLIN

)
) FINDINGS OF FACT, CONCLUSIONS
) OF LAW, AND ORDER

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on October 28, 1977, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order.

FINAL ORDER

1. The Application of Donald V. and Doreen M. Frolin is hereby granted for Beneficial Water Use Permit No. 9787-g76L to appropriate 0.55 cubic feet per second or 250 gallons of water per minute, not to exceed 161 acre-feet per annum, in Sanders County, Montana to be diverted by means of a well, approximately 300 feet deep, at a point in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 2, Township 23 North, Range 24 West, M.P.M., and used for new irrigation on a total of 56 acres, more or less, in said Section 2, from April 15 to October 15, inclusive, of each year.

2. The above permit is provisional and is granted subject to:

- a. All prior water rights in the source of supply.
- b. Any final determination of prior existing water rights in the source of supply as provided for in Montana law.
- c. All prior Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation reserved water rights in the source of supply.

3. The above permit is further conditioned as follows:

- a. The Permittees shall install a flow meter and shall keep a daily record of hours, rate of flow, and volume pumped and shall make said record available to the Department of Natural Resources and Conservation upon request.

b. Upon determination by the Department that prior water rights are

CASE # 9787

being adversely affected by this appropriation the Permittees shall cease pumping, as directed by the Department, immediately upon receipt of such an order.

RECOMMENDATION

The Department recommends that all parties in this matter install and maintain adequate measuring devices to fit their particular individual situation, and keep a log of records of water used for their own proof of their water rights and protection.

Done this 6th day of December, 1977.

Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

CASE # 9787

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT)
NO. 9787-g76L BY DONALD V.)
AND DOREEN M. FROLIN)

PROPOSAL FOR DECISION

Pursuant to the Montana Water Use and Administrative Procedures Acts, after due notice, a hearing was held August 10, 1977 at Polson, Montana, for the purpose of hearing objections to the above named Application, William F. Throm, Hearing Examiner, presiding.

The Applicants, Donald V. and Doreen M. Frolin, appeared at the Hearing to present testimony in support of their application. They were represented by Mr. Kent Duckworth, Attorney at Law. Mr. Duckworth introduced into evidence items of expense the Frolins have thus far incurred in developing the proposed source of supply and distribution system, however, the exhibits were rejected by the Hearings Examiner on the grounds that expenses incurred are not a criteria on which the merits of their application are to be judged and are therefore irrelevant to the issues.

Objectors present at the Hearing were: Mr. Frank Carr, Mr. Clayton White, Mr. Paul Howser, Mr. Charles E. Baxter, Mr. Raymond Hughes and Mr. John Malinak. No objector present was represented by legal counsel nor did any objector introduce exhibits in support of their objections.

Mr. Tom Patton, Department Geologist and Mr. Jim Rehbein, Water Rights Bureau Field Office Manager, attended the Hearing and represented the Department of Natural Resources and Conservation. Mr. Patton introduced into evidence a Memorandum from himself to File 9787-g76L, Subject: Adverse Affect of the Proposed Well on Existing Water Rights, dated August 9, 1977. This Memorandum, with attachments, was received

CASE # 9787

into evidence without objection and was marked "Department Exhibit No. 1.

Attachments are "Location Map for Application 9787-g76L, "Hydrograph for the Lone Pine Well," and U.S. Geological Survey letter of August 5, 1940 from George C. Taylor, Jr. to the Division of Ground Water Geologist, U.S.G.S., Washington, D. C.

PROPOSED FINDINGS OF FACT

1. On October 12, 1976 the Department received from Donald V. and Doreen M. Frolin, Application No. 9787-g76L to appropriate 0.55 cubic feet per second or 250 gallons per minute of water and not to exceed 161 acre-feet per annum, in Sanders County, Montana, to be diverted by means of a well, approximately 300 feet deep, at a point in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 2, Township 23 North, Range 24 West, M.P.M., and used for new irrigation on a total of 56 acres, more or less, in said Section 2, from April 15 to October 15, inclusive, of each year.

2. On February 24, March 3 and 10, 1977 the Department caused to be duly published in the Plainsman, Plains, Montana, notice of the above Application No. 9787-s76L.

3. The Department received timely objections to the above application as follows:

March 7, 1977 from Paul, Bette and Lucky Howser

March 10, 1977 from the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation

March 24, 1977 from Clayton White

March 28, 1977 from Walter Rau

March 29, 1977 from John Malinak

March 29, 1977 from Frank C. Carr

March 21, 1977 from Dustry Torgerson

April 6, 1977 from Arvid Kopp

4. On April 15, 1977 the Department received untimely objections to the above application from Charles E. Baxter and Raymond M. Hughes, however, the Hearings Examiner accepted these objections for consideration in reaching a decision in this matter.

5. The Applicant Mr. Donald Frolin, testified that he proposes to pump from the ground water source and irrigate 56 acres of alfalfa and orchard grass for hay production. He stated that in the past several years he has attempted to construct an irrigation storage reservoir, but it has not proven to be successful. He testified that he has drilled and cased a well for his water source; that the well is 280 feet deep; that the well log shows sand from 0 to 23 feet, gravel from 23 to 24 feet, fine sand, clay and gravel from 24 to 70 with a little water from 60 to 70 feet and fractured rock from 70 to 280 feet with water from 270 to 280 feet that rose to within 26 feet from the top of the casing and that the static water level is now 30 feet from the top of the casing. Mr. Frolin stated that he needs this water source in order to produce hay for his ranch operation.

6. The Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation were not represented at the Hearing; however, their objection is based on the Doctrine of Indian Reserved Water Rights wherein they contend that the Laws of Montana relating to water have no application within the Flathead Indian Reservation and that the State of Montana does not have the authority to issue such a permit, therefore, the Application must be denied.

7. The remaining objectors based their objection on the fear that pumping of the volume of water at the rate the Applicant has proposed will adversely affect their prior ground water appropriations. They cited an experience with a Bureau of Reclamation well drilled a number of years ago and known as the "Lone Pine Well" which did reportedly adversely affect the artesian ground water source in the valley and was subsequently shut down. Paul Howser who has springs in the same

section as the proposed point of diversion expressed sincere concern as to the impact the proposed ground water withdrawal would have on these springs.

8. Mr. Tom Patton, Department Geologist, stated that the Department lacks sufficient information on ground water geology in the area to state conclusively as to what impacts, if any, the proposed withdrawal will have on prior ground water appropriations. Mr. Patton stated at the time of pumping sufficient records were not made to describe the extent the Lone Pine Well did cause water level changes in other wells in the vicinity. Mr. Patton testified that the Lone Pine Well pumped from 1,500 to 2,000 gallons per minute and was 3 to 4 miles from the nearest objector's well whereas the Frolin Well is to pump only 250 gallons per minute and is an additional 5 miles away. Therefore, any potential adverse affects from the Frolin Well would be significantly less than affects that could be expected from the Lone Pine Well. Mr. Patton also testified that the hydro-geologic inter-connection between the aquifer of the Frolin Well and the Objector's wells is definitely less than 100% which would further lessen the chance for adverse affects to prior appropriators by ground water withdrawals from the Frolin Well. In regards to the Howser Springs, Mr. Patton expressed his opinion that these springs obtain water from two possible sources, one of which is separate from those used by the Frolin ground water well. Because of this the withdrawal of groundwater from the Frolin well is not expected to affect the springs significantly.

PROPOSED CONCLUSIONS OF LAW

1. The Objectors to this Application have apparent prior appropriation rights to a ground water source in a gravel aquifer in and adjacent to Townships 22 and 23 North, Range 23 West all within the Flathead Indian Reservation in Sanders County, Montana, which may or may not be geologically interconnected with the Applicant's proposed source of supply.

2. In accordance with Section 89-866(1) R.C.M. 1947, the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in the Water Use Act. Therefore, until such time as otherwise determined, the State of Montana maintains jurisdiction over the issues determined herein.

3. Under the provisions of Section 89-880 R.C.M. 1947, a permit is required to appropriate water from the proposed source of supply.

4. There are unappropriated waters in the proposed source of supply.

5. The rights of prior appropriators will be protected if the permit is conditioned to protect those rights.

6. The proposed means of diversion is adequate.

7. The proposed use of water is a beneficial use.

8. The proposed use of water will not interfere unreasonably with other planned use or developments for which a permit has been issued or for which water has been reserved.

9. The criteria for issuance of a permit set forth in Section 89-885 R.C.M. 1947, have been met.

10. The Application for Beneficial Water Use Permit may be granted in accordance with the provisions of Chapter 8 of Title 89 of the Laws of the State of Montana.

PROPOSED ORDER

1. The Application of Donald V. and Doreen M. Frolin is granted for Beneficial Water Use Permit No. 9787-g76L to appropriate 0.55 cubic feet per second or 250 gallons of water per minute, not to exceed 161 acre-feet per annum, in Sanders County, Montana to be diverted by means of a well, approximately 300 feet deep, at a point in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 2, Township 23 North, Range 24 West, M.P.M., and used for new irrigation on a total of 56 acres, more or less, in said Section 2, from April 15 to October 15, inclusive of each year.

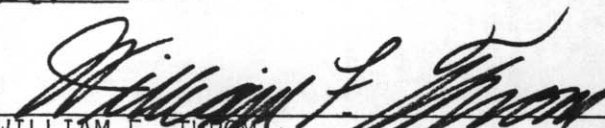
CASE # 9787

2. The above permit is provisional and is granted subject to:
 - a. All prior water rights in the source of supply.
 - b. Any final determination of prior existing water rights in the source of supply as provided for in Montana law.
 - c. All prior Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation reserved water rights in the source of supply.
3. The above permit is further conditioned as follows:
 - a. The Permittees shall install a flow meter and shall keep a daily record of hours, rate of flow, and volume pumped and shall make said record available to the Department of Natural Resources and Conservation upon request.
 - b. Upon determination by the Department that prior water rights are being adversely affected by this appropriation the Permittees shall cease pumping, as directed by the Department, immediately upon receipt of such an order.

NOTICE

This is a Proposed Order and will not become final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to the Proposed Order, if any, shall be mailed to the Department within ten (10) days of service upon the parties herein. Upon receipt of any written exceptions opportunity will be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

DATED this 28th day of October 1977.



WILLIAM F. THROM
HEARING EXAMINER

AFFIDAVIT OF SERVICE
(Proposed Order)

STATE OF MONTANA)
) ss.
County of Lewis and Clark)

Ronald J. Guse, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says: That, on October 28, 1977, he deposited in the United States mail, "certified mail, return receipt requested," a copy of the Proposed Order by the Department Hearing Examiner on the application by Donald V. and Doreen M. Frolin, Application No. 9787-g76L, for a permit to appropriate water, addressed to each of the following persons or agencies: Cert. No. 182728-182739

1. Mr. Donald and Ms. Doreen Frolin, Niarada, MT 59852
2. Mr. Richard A. Baenen, General Counsel, Confederated Salish and Kootenai Tribes, 1735 New York Ave., N.W., Washington, D.C. 20006
3. Mr. Arvid Kopp, Rt. 3, Box 418, Hot Springs, MT 59845
4. Mr. Dusty Torgenson, Bitterroot Water Users Assoc., Rt. 3, Hot Springs, MT 59845
5. Mr. Walter Rau, Rt. 1, Hot Springs, MT 59845
6. Mr. John Malinak, Rt. 3, Hot Springs, MT 59845
7. Mr. Frank C. Carr, Rt. 3, Box 456, Hot Springs, MT 59845
8. Mr. Clayton White, Route 3, Box 399, Hot Springs, MT 59845
9. Messrs. Paul and Lucky, and Ms. Betty Houser, Hot Springs, MT 59845
10. Mr. Charles E. Baxter, Hot Springs, MT 59845
11. Mr. Raymond M. Hughes, P.O. Box 457, Hot Springs, MT 59845
12. Mr. James H. Rehbein, Water Rights Bureau Field Office, Department of Natural Resources and Conservation, P.O. Box 224, Kalispell, MT 59901 (Regular mail)
13. Mr. Kent Duckworth, Attorney at Law, P.O. Box 1491, Polson, MT 59860

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by

Ronald J. Guse

STATE OF MONTANA)
) ss.
County of Lewis and Clark)

On this twenty-eighth day of October, 1977, before me, a Notary Public in and for said State, personally appeared Ronald J. Guse, known to me to be the Assistant Chief, Water Rights Bureau, of the department that executed this instrument or the persons who executed the instrument on behalf of said department, and acknowledged to me that such department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

[Signature]
Notary Public for the State of Montana

NOTARY PUBLIC for the State of Montana
Residing at Billings, Montana
My Commission Expires July 6, 1979

My commission expires _____

CASE # 9787